United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 18,953

JOHN L. JACKSON,

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee.

730

Forma Pauperis Appeal from a Judgment of the

United States District Court for the District of Columbia

THOMAS SCHATTENFIELD
DAVID H. SCHWARTZ

Counsel for Appellant
(Appointed by this Court)

1000 Federal Bar Building
Washington 6, D. C.

QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Did the court below err in permitting the jurors to be informed, during the course of voire dire examination, of the heart attack suffered by a priest during the course of the robbery and his death shortly thereafter?

2. Did the court below err in denying appellant's motion for a mistrial which was made in response to the several references to the priest's death in the government's opening statement?

3. Did the court below err in denying appellant's motion for a mistrial on the basis of the numerous and vivid descriptions of the priest's death given by the victim of the robbery during his direct examination?

4. Did the court below err in failing to charge, on its own motion, that the evidence of the priest's death was totally irrelevant to the guilt or innocence of the appellant?

5. Did the court below commit plain error when it gave the jury an erroneous instruction defining "reasonable doubt"?

6. Did the court below commit plain error when it gave the jury an instruction to the effect that appellant could be convicted if he aided or abetted a principal offender?

INDEX

TABLE OF AUTHORITIES

CONSTITUTIONAL AND STATUTORY PROVISIONS

OTHER AUTHORITIES

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,953

JOHN L. JACKSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Forma Pauperis Appeal from a Judgment of the

United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

On August 12, 1964, appellant was convicted of robbery under 22 D.C. Code §2901. On August 28, 1964, judgment was entered and appellant was sentenced to imprisonment for a term of four (4) to twelve (12) years [Judgment]. On September 15, 1964, the United States

District Court for the District of Columbia entered an order granting appellant's Application for Leave to Appeal in Forma Pauperis [Order]. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1291.

STATEMENT OF THE CASE

BACKGROUND

An indictment was filed in the United States District Court for the District of Columbia on May 28, 1962, charging appellant and Harold S. Cross with two counts of robbery under 22 D.C. Code §2901 [Indictment]. The first count of the indictment charged that on or about February 23, 1962, appellant and Cross had stolen certain property from Father Thomas V. Cantwell and the Church of the Incarnation. The second count of the indictment charged that appellant and Cross had, on or about May 2, 1962, stolen property belonging to Elva M. Burton and Joseph A. Chase. Appellant and Cross were tried together, and, on December 18, 1962, they were each adjudged guilty on the first count of the indictment and were found not guilty on the second count. Appellant was sentenced for a term of three (3) to nine (9) years. This Court subsequently reversed their convictions and remanded the cases to the United States District Court for the District

of Columbia for a new trial [118 U.S.App. D.C. 324, 335 F.2d 987 (1964)]. Appellant was retried for the church robbery [Hart, J. presiding] and, on August 12, 1964, was found guilty [Tr. 480]. On August 28, 1964, appellant was sentenced for a term of four (4) to twelve (12) years [Tr. 489].

THE TRIAL

A. Events Prior to Voire Dire

At the outset of appellant's second trial, prior to voire dire and out of the presence of the jury, defense counsel requested that no mention be made of the death of a priest (Father Carney) who suffered a heart attack during the course of the robbery and died shortly after the robbers' escape [Tr. 4]. The prosecutor responded that the priest's death necessarily had to come to light during the trial. Defense counsel expressed his belief that the facts and circumstances of Father Carney's death were irrelevant [Tr. 6-7]. He further expressed his willingness to stipulate that Father Carney had died subsequent to the robbery in order to account for his absence at the trial [Tr. 5]. At the end of this discussion the trial court concluded that the jurors should be examined regarding Father Carney's death on

voire dire [Tr. 8], but reserved a ruling on the admissibility of any evidence relating to the priest's death [Tr. 7]. The prospective jurors were questioned by the trial court about Father Carney's death [Tr. 15] and those who indicated that they had read about the case expressed their ability to nonetheless render a fair and impartial verdict [Tr. 15-19].

B. Opening Statement of the Prosecution

In the government's opening statement, the prosecutor outlined for the jury the facts which the government expected to prove. In summary, the government's opening statement was to the effect that at approximately 11:00 p.m. on February 23, 1962, appellant, along with Harold S. Cross, Kay Marie Foster and Hazeltine Price, drove to the vicinity of the Rectory of the Church of the Incarnation at 880 Eastern Avenue, Northeast and parked their car. There were two persons in the Rectory at the time, Father Cantwell and "the other Father whose death [the jury had] already heard of." [Tr. 47]. The door buzzer of the Rectory rang and was answered by Father Carney [Tr. 48]. Shortly thereafter two men whose faces were covered with stockings and who were carrying guns entered the Rectory with Father

Carney. While one of the men held a gun on Father Carney the other man took personal property and money belonging to Father Cantwell and to the Church [Tr. 48-49]. The prosecutor related how

> "[d]uring this entire episode Father Cantwell was very much concerned with the well-being of Father Carney. He was concerned because Father Carney at the time was suffering from a heart condition. . . . Immediately after the persons left he made some effort to calm Father Carney, who was much excited by this incident. He made a call. . . . When he came back after having made the call . . . he found Father Carney slumped down in a chair." [Tr. 49-50].

The prosecutor continued, noting that the two men who had perpetrated the robbery were Cross and the appellant. Both men returned to the car, where Miss Price and Miss Foster had been waiting, and the four of them drove to a tourist home where they remained for a short while [Tr. 50-51]. They left that tourist home and drove to the Key Bridge where they disposed of some of the items which had been taken in the robbery and which were of no value to them [Tr. 51-52]. Allegedly the four persons then went to a tourist home at 140 Twelfth Street, Northeast, which was owned and operated by a Mrs. Burton and a Mr. Chase, where they spent the night [1] [Tr. 51].

---

1 This is the tourist home for whose robbery in May, 1962, Cross and Jackson were tried and acquitted.

Counsel for the government explained that

> "[t]he next day, after leaving the tourist home, they read in the papers of this robbery and of the subsequent death of Father Carney. At this point they became very much concerned with the fact that they might be connected with that death and with that robbery. . . ." [Tr. 52].

They thereupon returned to the Key Bridge, retrieved the items which they had previously secreted there, and threw them into a storm sewer.

At the conclusion of the government's opening statement, defense counsel moved for a mistrial at the bench on the grounds that the prosecution, in its opening statement, had made excessive reference to Father Carney's death--an irrelevant factor tending to prejudice the jury. [Tr. 54-55]. Stating that defense counsel was overly sensitive on the issue, the trial court overruled the motion [Tr. 55].

C. Testimony of Father Cantwell

1. Direct Examination of Father Cantwell

The government's first witness was Father Thomas V. Cantwell, a Roman Catholic priest, who had been pastor of the Church of the Incarnation at the time of the robbery [Tr. 57]. Father Cantwell recounted the events which took place at the Rectory on the night of February 23, 1962. He noted that the door buzzer rang at

approximately 11:00 p.m., and that shortly thereafter he heard Father Carney call to him [Tr. 59]. Since Father Carney was "suffering from a very, very bad heart condition [Father Cantwell] figured he was getting an attack" and got out of bed in order to assist him [Tr. 59]. He then saw the light go out in the study and observed two armed men with covered faces [Tr. 60]. One of the men asked him for his money and Father Cantwell responded:

> "I'll give you all of it but now lets be careful. Father's got a bad heart condition." [Tr. 60].

Father Cantwell proceeded to turn over the money and other property as quickly as possible since he was "anxious to get him out before Father Carney had an attack then and there." [Tr. 63]. In fact, at this point, according to Father Cantwell, "Father Carney [was] moaning and groaning and [was] about ready to go any time." [Tr. 65].

Father Cantwell identified the government's exhibit numbered one as the petty cash box which was taken from the Rectory [Tr. 68] and the government's exhibit numbered 2 as the wristwatch which had been taken from him during the robbery [Tr. 72]. Father Cantwell was not asked on direct examination, nor did he state, whether or not he could identify the appellant as one of the robbers.

At the conclusion of the direct examination of Father

Cantwell, defense counsel renewed his motion for a mistrial because of the many references in Father Cantwell's testimony to Father Carney's heart condition, his heart attack and subsequent death [Tr. 75-76]. The court, stating that "[i]t explains why the Father was so interested in complying with everything that they asked him to do, in trying to get them out of there in a hurry and otherwise not paying any attention to trying to identify them", overruled the motion [Tr. 76].

2. Cross Examination of Father Cantwell

At the beginning of defense counsel's cross examination, Father Cantwell was asked [Tr. 77]:

> "Father, is it fair to say that you don't know whether the man sitting here is one of the men--"

Father Cantwell responded:

> "Oh, I'm sure he is one of the men."

Defense counsel thereafter attempted to impeach Father Cantwell's testimony by demonstrating that he had failed to identify either Cross or appellant as the robbers at their first trial [e.g., Tr. 85, 86, 91]. Over defense counsel's objection Harold Cross was brought into the courtroom [Tr. 92-93] and Father Cantwell identified him, stating "[t]hat was the man who had the gun on me, definitely he." [Tr. 94].

C. Balance of Government's Case

After concluding with Father Cantwell, the government called the rest of its witnesses. Kay Marie Foster and Hazeltine Price (Peyton) both testified that appellant and Cross were the men who had robbed the Church [Tr. 106, 162-166]. Mrs. Burton and Mr. Chase testified that appellant had been one of a group of four people who had registered together at their tourist home at approximately 4:00 a.m. on February 24, 1962 [Tr. 212-213, 227-230]. At the conclusion of the government's case, defense counsel moved for a judgment of acquittal, which motion was denied [Tr. 262].

D. Defendant's Case

The defendant's case consisted mainly of the testimony of a number of individuals [Williams Tr. 278-292; Hargrove Tr. 292-301; M. Copeland Tr. 329-336; S. Copeland Tr. 337-339; and Amos Tr. 348-350] to the effect that Jackson was at a birthday party in his honor at his home at the time the robbery allegedly occurred.

Appellant took the stand in his own behalf and testified that he had been at the Burton-Chase tourist home in the early hours of February 23, 1962, with a young woman, had left there at about 10:00 a.m.

on February 23, and had gone home [Tr. 366-367].[2]

Appellant, too, testified that a party in celebration of his birthday was held on the night of February 23, 1962, and that he had attended such party [Tr. 369]. When appellant learned that the police were looking for him in May, 1962, he went to an attorney and from there to the United States Commissioner's office [Tr. 371-372] where he was taken into custody by the police.

STATEMENT OF POINTS

Appellant intends to rely upon the following points in this appeal:

1. The heart attack suffered by Father Carney during the course of the robbery and his death immediately thereafter were irrelevant to appellant's guilt or innocence of the crime for which he was tried. The information regarding such circumstances which was

---

2 Since the robbery allegedly occurred at approximately 11:00 p.m. on February 23, 1962, for appellant to have registered at the tourist home after the robbery at 4:00 a.m. on February 23, 1962, which was the registration time indicated in the tourist home's records, the register at the tourist home would have to be kept on the basis of the previous day's date. Although Mrs. Burton and Mr. Chase testified that this was, in fact, the manner in which the register was kept [Tr. 215-217, 231, 233-234], their testimony relating to the time when the date changed was in conflict. Mrs. Burton testified that each new day began at 7:00 a.m. [Tr. 216], while Mr. Chase testified that the date was changed each day at noon [Tr. 231].

conveyed to the jury was highly inflamatory and prejudicial. It was reversible error for the trial court '

(a) To inform the jurors, during the course of their voire dire examination, of the priest's heart seizure and subsequent death;

(b) To deny appellant's motion for a mistrial on the basis of the repeated references to Father Carney's heart attack and death made during the course of the government's opening statement;

(c) To deny appellant's motion for a mistrial on the basis of Father Cantwell's repeated and vivid descriptions of Father Carney's heart attack and death; and

(d) To fail to charge the jury, on the trial court's own motion, that the evidence concerning Father Carney's heart attack and death was totally irrelevant to the appellant's guilt or innocence of the crime for which he was being tried.

2. The trial court committed plain error, in the circumstances of this case:

(a) When it gave the jury an erroneous instruction defining "reasonable doubt"; and

(b) When, during the course of its charge it told the jury that appellant could be found guilty of the robbery if he aided and abetted the principal offender.

SUMMARY OF ARGUMENT

I

Appellant requested, at the outset of his trial below, that the heart attack suffered by Father Carney and his death shortly after the robbery not be disclosed to the jury. Despite appellant's contention that such information was totally irrelevant and highly prejudicial, the trial court decided that such matter should be brought to the attention of the jurors on voire dire. Numerous references to Father Carney's illness, his heart seizure and death were thereafter made during the course of the government's opening statement and during the direct examination of the victim of the robbery, Father Cantwell. The trial court did not instruct the jury, on its own motion, that such evidence was irrelevant to their consideration of appellant's guilt or innocence. Appellant contends that the evidence relating to Father Carney's death was irrelevant and highly prejudicial and that its admission over appellant's objections constituted reversible error. Frank v. United States, 104 U.S. App. D. C. 384, 262 F.2d 695 (1958); United States v. Tomailo, 249 F.2d 683 (2d Cir. 1957); Leigh v. United States, 113 U.S. App. D.C. 390, 308 F.2d 345 (1962); Kotteakos v. United States, 328 U.S.

750 (1946). In addition, once such evidence had been admitted, the trial court's failure to charge the jury that such evidence must be disregarded in determining appellant's guilt constituted reversible error. United States v. Tomailo, 249 F.2d 683 (2d Cir. 1957).

II

(a) The trial court charged the jury, in defining "reasonable doubt", that if

> "you can truthfully say that you have an abiding conviction of the defendant's guilt such as you would be willing to act upon in the more weighty and important matters relating to your personal affairs then you have no reasonable doubt." [Tr. 466].

The foregoing charge on reasonable doubt is contrary to the law. Jones v. United States, ____ App. D.C. _____, 338 F.2d 553 (1964); Scurry v. United States, No. 18,633 (April 15, 1965) (slip opinion). Although no objection was made to such charge, appellant submits that, in the circumstances of this case, this erroneous charge affected appellant's substantial rights and constitutes reversible error. F.R.Cr. Pro. 52(b).

(b) The trial court charged the jury on the statutory language of aiding and abetting a principal offender contained in 22 D.C. Code §105 [Tr. 471]. The trial court failed to elaborate upon such charge

or to explain to the jury what such statutory language meant. The fact that appellant pawned a watch which had been taken in the robbery is uncontested. Since the trial court failed to explain the elements necessary to prove that appellant aided or abetted the principal offender, the jury could reasonably have returned a verdict of guilty solely because the appellant pawned a stolen watch. Such instruction therefore, even though not the subject of an objection, constituted plain error and warrants a reversal of appellant's conviction. Byrd v. United States, ___ U.S. App. D.C. ___, 342 F.2d 939 (1965); Miller v. United States, 116 U.S. App. D. C. 45, 320 F.2d 767 (1963); Mullen v. United States, 105 U.S. App. D. C. 25, 263 F.2d 275 (1959); F.R. Cr. Pro. 52(b).

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PERMITTING THE JURY TO HEAR, THROUGHOUT THE COURSE OF THE TRIAL AND OVER APPELLANT'S REPEATED OBJECTIONS, EVIDENCE CONCERNING THE HEART ATTACK SUFFERED BY ONE OF THE VICTIMS OF THE ROBBERY AND HIS SUBSEQUENT DEATH. THE COURT FURTHER ERRED BY NOT CHARGING THE JURY, ON

THE COURT'S OWN MOTION, THAT ALL OF THE EVIDENCE WHICH THE JURY HAD HEARD CONCERNING SUCH HEART ATTACK AND DEATH WAS IRRELEVANT TO APPELLANT'S GUILT OR INNOCENCE OF THE CRIME FOR WHICH HE WAS BEING TRIED.

With respect to Point I, appellant desires that the Court read the following pages of the reporter's transcript: Tr. 4-10 inclusive; 13-15 inclusive, 47, 49-54 inclusive, 56-100 inclusive, 463-478 inclusive.

Appellant was indicted and tried for the robbery of certain property belonging to the Church of the Incarnation, a Roman Catholic church located in Washington, D. C., and of certain property belonging to Thomas V. Cantwell, the pastor of the Church at the time the robbery occurred [Tr. 11]. A semi-retired priest, Father Carney, who had been a resident of the Church's Rectory, suffered a heart attack and died immediately after the robbery occurred [Tr. 14].

At the very outset of the proceedings below, defense counsel requested at the bench that Father Carney's death not be mentioned during the course of the trial [Tr. 4]. After listening to argument on that issue the trial judge informed defense counsel that he should examine the jurors regarding Father Carney's death on voire dire

[Tr. 8]. Defense counsel indicated that in such circumstance he would prefer having the Court conduct the examination [Tr. 8]. The Court consented thereto and thereafter conducted the examination [Tr. 14-15].

Appellant contends that the trial court committed reversible error by placing appellant in the untenable position of either informing the jurors of Father Carney's death, and thereby suffering the prejudicial effects which could result therefrom; or remaining silent and thereby waiving any right to object if the circumstances of the priest's death were divulged during the course of the trial. Defense counsel was informed by the trial judge:

> "[I]f you don't do it and it comes out later you will have no right to complain about the fact that maybe they knew something about it . . ." [Tr. 8].

It is submitted that the fact that Father Carney suffered a heart attack and died immediately after the robbery was totally irrelevant to appellant's guilt or innocence of that robbery; the prosecutor himself did not maintain that it had any relevance to such issue [See the reasons expressed by the government for admitting the information at Tr. 4-5]. To avoid the problems raised by Father Carney's absence from the trial, defense counsel was willing to enter into a stipulation to the effect that he had died subsequent to the robbery, without mentioning

the circumstances of his death [Tr. 6].[3]

> "The criterion of relevancy is whether or not the evidence adduced tends to cast any light upon the subject of the inquiry. Evidence of any fact is admissible as relevant which might establish the hypothesis of innocence or show the defendant's guilt. . . . Underlining all the definitions is the concept that the evidence in question must tend to prove or disprove the existence of a particular fact, and that the existence or nonexistence of that particular fact is material or will affect the outcome of the trial." Wharton's Criminal Evidence §148 at 284-87 (12th ed. 1955).

The government was not content to permit the jurors to learn of the circumstances of Father Carney's death on voire dire and to thereafter abandon the issue. During the course of his opening statement the prosecutor elaborated upon Father Carney's physical condition at the time of the robbery [Tr. 49], his collapse following the robbery [Tr. 50], and his death thereafter [Tr. 47]. In fact, although appellant has never been indicted therefor, the jury could infer from the government's opening statement that appellant was or could be

---

3 It should be noted that this is the manner in which the issue was treated in Harold Cross' second trial. Believing information of the death to be inflammatory the trial court in that case refused to admit any evidence relating to Father Carney's death to the jury [See, Transcript of Proceedings, United States of America vs. Harold S. Cross, Criminal No. 470-62 (December 2-8, 1964) at 10-14].

held legally responsible for Father Carney's death.[4] On the basis of the prosecutor's remarks concerning Father Carney's illness and death the appellant moved for a mistrial at the conclusion of the opening statement [Tr. 54]. The motion was denied.

The government's opening statement was followed by the testimony of Father Thomas V. Cantwell, who was a victim of the robbery and the government's principal witness. Father Cantwell related the circumstances of the robbery and identified appellant for the first time as one of the robbers. He told the jury about Father Carney's severe heart condition [Tr. 59,60], the likelihood that Father Carney would have a heart attack during the robbery [Tr. 63], and Father Carney's moaning, groaning and imminent collapse [Tr. 65]. Appellant's renewed motion for a mistrial at the conclusion of Father Cantwell's direct examination was denied [Tr. 75-76].

Although the trial judge informed the jury on voire dire that

> " this defendant is not charged with anything

---

4. Such inference is not unlikely in view of the prosecutor's statement that the robbers "became very much concerned with the fact that they might be connected with that death . . ." [Tr. 52].

in connection with that death." [Tr. 15][5]

at no other time during the course of the lengthy trial or in his charge did he admonish the jurors not to consider any evidence relating to such death in determining appellant's guilt or innocence of the crime of robbery.

The evidence relating to Father Carney's death was irrelevant to appellant's guilt or innocence. It was, in addition, so highly inflammatory that it cannot be said with certainty that its admission did not prejudice the jurors. Irrelevant evidence should at all times be excluded from a trial; this is especially true when, in addition to being irrelevant, the evidence is of such a nature that it tends to excite prejudice or to mislead the jury. Wharton's Criminal Evidence §160 (12th ed. 1955).

There is no doubt of the irrelevancy or the inflammatory nature of this evidence. In Frank v. United States, 104 U.S. App. D.C. 384, 262 F.2d 695 (1958), this Court reviewed the defendant's conviction for failure to register as an agent of the Dominican Republic. In the

---

5. By limiting this exculpatory statement to this defendant, the trial judge may have inadvertently led the jurors to conclude that Harold Cross was charged with the priest's death.

course of his opening statement the prosecutor referred to Frank's denial of any knowledge concerning the mysterious disappearance of Dr. Jesus de Galindez, a Columbia University instructor. In addition, over Frank's objection, the government introduced evidence which implied that Frank was connected with Galindez' disappearance. This Court reversed Frank's conviction, and in so doing stated:

> "[T]he probative value of the evidence about the Galindez - Murphy affair was too slight and its prejudicial tendency too great to justify its introduction. 'Although sensational and shocking evidence may be relevant, it has an objectionable tendency to prejudice the jury. It is, therefore, incompetent unless the exigencies of proof make it necessary or important that the case be proved that way.' " 104 App. D.C. at 386, 262 F.2d at 697.

In United States v. Tomailo, 249 F.2d 683 (2d Cir. 1957), the United States Court of Appeals for the Second Circuit reversed a bank robbery conviction because of the admission of evidence of the defendant's violations of rules of the New York State Parole Board and his associations with known criminals. The Court held that such evidence was irrelevant and prejudicial. Its admission, in the aggregate, made it impossible for the defendant to have received a fair trial.

Absent the prejudicial evidence which was admitted in the proceedings below, the evidence to support appellant's guilt was not

at all overwhelming. Appellant was identified for the first time by Father Cantwell during his cross examination by the appellant [Tr. 77].[6] Kay Marie Foster and Hazeltine Price each identified him as a participant in the robbery; however, Miss Price had executed an affidavit prior to appellant's trial which exonerated him from any part in the offense [Tr. 196-200]. Appellant testified that he had been at the Chase-Burton tourist home during the morning of February 23, 1962 [Tr. 367]; however, in order for him to have been there at 4:00 a.m. and after the robbery (since the robbery allegedly occurred at 11:00 p.m. on February 23), the register at the tourist home would have to be kept on other than a calendar day basis. Although Mr. Chase and Mrs. Burton stated that the register was kept on another basis, the exact manner in which it was kept was the subject of conflicting testimony.[7]

Even if the case against the appellant were stronger than it is, this Court has held that the strength of the government's case should not foreclose the issue of the admission of irrelevant and prejudicial matter into a trial. Leigh v. United States, 133 U.S. App. D. C. 390,

---

6. Father Cantwell had not identified either appellant or Cross as the participants in the robbery in their first trial for this offense. See, Transcript of Proceedings, United States of America vs. Harold S. Cross, John L. Jackson, Criminal No. 470-62 (December 11-18, 1962) at 66-67, 70-73.

7 Chase testified that each new day began at noon [Tr. 231], Burton testified that each new day began at 7:00 a.m. [Tr. 216].

308 F.2d 345 (1962). In that case Leigh was prosecuted for forgery. An exhibit was introduced into evidence over defendant's objection for the purpose of a handwriting comparison. The exhibit was a card which had been filled out by the defendant while he was in police custody. The card indicated that defendant had been arrested on other occasions for passing forged checks. The defendant's conviction was reversed, per curiam, by this Court even though the record did not make clear whether the jury had even seen the questionable exhibit. In reversing the conviction this Court stated:

> "Certain it is that evidence of his guilt, even without the card, was substantial and might very well have caused the jury to bring in a verdict of guilty, but we cannot say that the matter objected to did not have substantial influence on the jury in reaching its verdict." 113 U.S. App. D.C. at 391, 308 F.2d at 346.

In the Leigh case this Court cited with approval the following language from Kotteakos v. United States, 328 U.S. 750 (1946), to the effect that:

> "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. . . ." 328 U.S. at 765.[8]

---

8 See, also, Sang Soon Sur v. United States, 167 F.2d 431 (9th Cir. 1948); Yeldell v. United States, 153 A.2d 637 (D.C. Mun. App. 1959); and United States v. Birnbaum, 337 F.2d 490 (2d Cir. 1964) in which the admission of irrelevant and prejudicial matter resulted in reversals of the convictions.

The trial court in this case not only permitted the irrelevant and prejudicial matter of Father Carney's death to repeatedly be mentioned, but in addition failed to admonish the jury at the end of the government's opening statement, at the end of Father Cantwell's direct examination, or during the course of its charge, that Father Carney's heart attack and death were irrelevant to appellant's guilt or innocence. In United States v. Tomailo, 249 F.2d 683 (2nd Cir. 1957) (discussed supra), one of the expressed reasons for the reversal of that appellant's conviction was that "[N]o instruction was given at this time or in the Court's charge to the effect that this evidence regarding association with criminals should be entirely disregarded." 249 F.2d at 689.

Although the record does not disclose any objection to the trial judge's failure to charge the jury as to the irrelevancy of such matter, it is appellant's contention that such omission of the trial judge constitutes "plain error" affecting "substantial rights" of the appellant, and warrants a reversal of his conviction. F.R. Crim. Pro., 52(b).

II. THE TRIAL COURT COMMITTED PLAIN ERROR, IN THE CIRCUMSTANCES OF THIS CASE, (a) WHEN IT GAVE THE JURY AN ERRONEOUS INSTRUCTION DEFINING "REASONABLE DOUBT";

AND (b) WHEN, DURING THE COURSE OF ITS CHARGE, IT TOLD THE JURY THAT APPELLANT COULD BE FOUND GUILTY OF THE ROBBERY IF HE AIDED AND ABETTED THE PRINCIPAL OFFENDER.

With respect to Point II, appellant desires that the Court read the following pages of the reporter's transcript: Tr. 463-479 inclusive, 364-366 inclusive, 376-380 inclusive.

During the course of its charge to the jury, the trial court explained the concept of "reasonable doubt" in the following manner:

> "A reasonable doubt is one which is reasonable in view of all the evidence. Therefore, if after impartial comparison and consideration of all the evidence, you can candidly say that you are satisfied with the guilt of the defendant, then you have a reasonable doubt but if after such impartial comparison and consideration of all the evidence and giving due consideration to the presumption of innocence which attaches to the defendant, you can truthfully say that you have an abiding conviction of the defendant's guilt such as you would be willing to act upon in the more weighty and important matters relating to your personal affairs, then you have no reasonable doubt." [Tr. 466].

The record discloses no objection to the foregoing charge nor does it disclose any request for an alternative definition of reasonable doubt.

Appellant submits that the foregoing instruction is contrary to the law and that such instruction, under the circumstances of this

case, constitutes plain error under Rule 52(b) of the Federal Rules of Criminal Procedure.

In Jones v. United States, ___ App. D. C. _____, 338 F. 2d 553 (1964), in the course of reviewing the appellants' convictions for housebreaking and larceny, this Court considered a charge on reasonable doubt, framed as in this appeal, in terms of "an abiding conviction of the defendants' guilt, . . . such as you would be willing to act upon in the more weighty and important matters relating to your personal affairs. . . ." _____App. D. C. at _____, 338 F. 2d at 555. In reversing the conviction on other grounds and remanding the case for a new trial, this Court observed that the foregoing section of the charge was erroneous. It held that reasonable doubt should be defined in terms of the kind of doubt that would make a person hesitate to act rather than the kind on which one would be willing to act.

In the recent case of Scurry v. United States, No. 18,633 (April 15, 1965) (slip opinion), the appellant alleged that the trial court's instruction on reasonable doubt was in error. In that case the trial court charged as to reasonable doubt in the same terms as in this case and in Jones. In Scurry this Court implied that such a charge

was incorrect on two grounds: first, in that it was expressed in terms of a willingness, rather than a hesitation to act; second, because "there is a substantial difference between a juror's verdict of guilt beyond a reasonable doubt and a person making a judgment in a matter of personal importance to him. To equate the two in the juror's mind is to deny the defendant the benefit of a reasonable doubt." Scurry v. United States, supra, at p. 4. It should be noted that the trial court in Scurry did include in another part of its reasonable doubt instruction the correct explanation that such doubt would result in a hesitation to act. No exception to the charge having been made below, this Court found no basis for invoking the plain error rule. Scurry v. United States, supra, at p. 2.

In Johnson v. United States, No. 18,915 (June 15, 1965) (slip opinion), Johnson claimed error in the trial court's instruction defining reasonable doubt. His conviction was reversed on other grounds, and this court observed that the error in the charge, in the circumstances of that case, was harmless.[9]

Rule 52(b) of the federal Rules of Criminal Procedure provides:

---

9 Appellant acknowledges that this Court has again, in recent days, rejected the argument that the type of charge on reasonable doubt made in this case was plain error. McGill v. United States, No. 18,829 (June 29, 1965) (slip opinion). Appellant contends, however, that in the totality of the circumstances of this case, the giving of such charge was plain error.

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Appellant submits that the trial court's erroneous definition of reasonable doubt was an error which affected his substantial rights. There was conflicting evidence during the trial concerning the appellant's whereabouts on the night of the robbery. Miss Foster and Miss Price alleged that he was at the Church and the tourist home. During the trial below Father Cantwell for the first time identified appellant as one of the robbers despite his testimony that he was concerned only with Father Carney during the robbery and despite the fact that the robbers' faces were completely masked. In these circumstances it cannot be said that the jury would have convicted appellant upon the basis of an accurate definition of reasonable doubt. Mullen v. United States, 105 U.S. App. D. C. 25, 263 F.2d 275 (1959). Even discounting the closeness of the case:

> "From presuming too often, all errors to be 'prejudicial', the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty." Bollenback v. United States, 326 U.S. 607, 615 (1946)

Appellant maintains that the trial court's instructions to the

jury were plainly erroneous in another respect. Following the trial court's explanation of the elements of the offense of robbery, it gave to the jury the following instruction:

> "Now, the law provides that any person advising, inciting or conniving in an offense or aiding or abetting the principal offender shall be charged as a principal. That is, he is as guilty of the offense as though he himself had committed it." [Tr. 471].

The Court continued, noting that:

> "There has been evidence to the effect that on April 9, 1962, this defendant had in his possession a watch which has been identified as something that was taken on the night of the 23rd. If the jury finds that the Government has proved beyond a reasonable doubt that the defendant had exclusive possession of stolen property shortly after the commission of a robbery, the jury in its discretion may infer that the possessor is involved in the robbery and the unexplained possession of recently stolen property may itself warrant the verdict of guilt of robbery." [Tr. 472].

The trial court did not define the concept of "aiding or abetting" to the jury; it merely paraphrased a portion of 22 District of Columbia Code §105 and informed them that one who aids or abets the principal offender is as guilty of the offense as though he himself had committed it. [Tr. 471]. There was no objection made to this portion of the charge, and the jury returned a general verdict of guilty [Tr. 480].

In Johnson v. United States, 195 F.2d 673 (8th Cir. 1952), the elements which are necessary in order to convict an accused of aiding and abetting the commission of a criminal offense were set forth in detail. The court stated:

> "To be an aider and abetter it must appear that one so far participates in the commission of the crime charged as to be present, actually or constructively, for the purpose of assisting therein. . . .Generally speaking, to find one guilty as a principal on the ground that he was an aider and abetter, it must be proven that he shared in the criminal intent of the principal and there must be a community of unlawful purpose at the time the act is committed. As the term 'aiding and abetting' implies, it assumes some participation in the criminal act in furtherance of the common design, either before or at the time the criminal act is committed." 195 F.2d at 675-76.

See, also, Kemp v. United States, 114 U.S. App. D. C. 88, 311 F.2d 774 (1962) in which "guilty knowledge" was held to be a critical element of aiding and abetting the unauthorized use of a motor vehicle.

It is most unlikely that the jury below understood the concept of "aiding and abetting", as set forth above, from the instruction which it was given. In reliance upon the foregoing charge and upon the charge to the effect that the unexplained possession of recently stolen property may itself warrant a verdict of guilty, they jury, while not convinced that appellant had participated in the robbery, could have nonetheless returned a verdict of guilty solely because appellant admittedly pawned

a watch which turned out to be stolen, thereby aiding and abetting the actual principal offender.[10]

In Byrd v. United States, ____ U.S. App. D. C. _____, 342 F.2d 939 (1965), this Court reviewed a robbery conviction. The trial court defined the crime of robbery to the jury by reading to them the appropriate section of the District of Columbia Code. The court did not, however, explain the elements of the offense which the prosecution had to prove in order to support a verdict of guilty. This Court reversed the conviction, holding that the trial court's failure to instruct the jury on every essential element of the crime constituted plain error.

In Miller v. United States, 116 U.S. App. D. C. 45, 320 F. 2d 767 (1963) this Court reversed, per curiam, the appellant's conviction for robbery. Chief Judge Bazelon filed an opinion in the case. He noted that the jury could have inferred from the evidence that the appellant either had taken the complainant's wallet from his pocket or had picked his wallet up from the sidewalk. Only in the former instance could appellant have been convicted of robbery. The trial

---

10 Appellant would even contest that in this case possession of the stolen watch on April 9, 1962, which is a date more than one month after the robbery could, by itself, warrant a verdict of guilty. Appellant's possession was neither recent nor unexplained. Appellant testified that he obtained the watch from an acquaintance, Arthur Kelton, on April 9, 1962, and that he assisted Kelton in pawning it [Tr. 364-366, 376-380]. Kelton, who testified at appellant's first trial, stated that appellant helped Kelton pawn a watch which Kelton had purchased from Kay Foster. See, Transcript of Proceedings, United States vs. Harold S. Cross, John L. Jackson, Criminal No. 470-62 (December 11-18, 1962) at 255-257.

court failed to instruct the jury that to justify a verdict of guilty the appellant must have taken the wallet from the person of the complaining witness. Finding that this "may well have conveyed to the jury the erroneous impression that the Government's case rested on direct testimony which, if believed, practically required a conclusion that the wallet had been stolen from the pocket of the complaining witness." 116 U.S. App. D. C. at 47, 320 F.2d at 768, Judge Bazelon held that the erroneous charge constituted plain error. See, also, Mullen v. United States, 105 App. D. C. 25, 263 F.2d 275 (1959) (failure to charge that evil state of mind was an essential element of offense was plain error); Jones v. United States, 113 U.S. App. D. C. 352, 308 F.2d 307 (1962) (omitting a charge that appellant must have had a legal duty to deceased warranted a reversal of involuntary manslaughter conviction); McFarland v. United States, 85 U.S. App. D. C. 19, 174 F.2d 538 (1949) (an equivocal instruction to the jury on a basic issue constituted grounds for reversal).

In Barry v. United States, 109 U.S. App. D. C. 301, 287 F. 2d 340 (1961) this Court reversed the appellant's conviction for fraudulently transporting a check in interstate commerce. The trial court had failed to charge that the government was required to prove beyond

a reasonable doubt that the appellant knew the check was forged. This omission was not objected to in the trial court or in this Court. This Court nonetheless found the omission to be plain error and reversed the conviction.

It is submitted that the trial court's instruction on "aiding and abetting" was irrelevant in view of the evidence adduced at the trial. Further, the jury could have found the appellant guilty on the basis of such charge while disbelieving that he assisted in the perpetration of the robbery. Thus, the trial court, by giving such charge, committed plain error affecting substantial rights of the appellant.

CONCLUSION

For the reasons set forth above, it is respectfully urged that the relief requested herein be granted and that the judgment of conviction below be reversed.

Respectfully submitted,

Thomas Schattenfield

David H. Schwartz

Attorneys for Appellant
(Appointed by this Court)

1000 Federal Bar Building
Washington 6, D. C.

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Brief for Appellant was mailed to David C. Acheson, Esquire, United States Attorney for the District of Columbia, United States Court House, Washington, D. C. on this 12th day of August, 1965.

David H. Schwartz

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,953

JOHN L. JACKSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

JOHN C. CONLIFF, JR.,
United States Attorney.

FRANK Q. NEBEKER,
ALLAN M. PALMER,
Assistant United States Attorneys.

Cr. No. 470-62

QUESTIONS PRESENTED

In the opinion of the appellee the following questions are presented:

1. Was appellant denied a fair trial because the trial court, in an effort to discover the extent of the prospective jurors knowledge of the instant cause, advised them during the *voir dire* examination that a few minutes after the alleged robbery of a church rectory a priest therein, who had a serious heart condition, died of a heart attack, especially when:

a) after identification of the case by government counsel without mention of the death apparently only one talesman responded to the question whether any of the jurors had prior knowledge of the facts of the case, and the judge then advised them of the death after he had determined that there had been an insufficient outline of the facts for the jurors to intelligently answer the question, the additional fact he provided them with bringing forth ten responses to the renewed question,

b) the facts of the death were not paraded before the jury during the trial,

c) the Government's case against appellant was strong,

d) after the surviving priest during cross-examination made an unanticipated courtroom identification of appellant as one of the robbers, defense counsel then probed the serious illness of the dead priest in an effort to undermine the identification by showing that the witness was very much concerned with the ill health of his coworker during the robbery and, as result thereof, did not pay close attention to the physical appearance of the robbers,

e) the prosecutor never mentioned the death during his closing or rebuttal arguments, and,

f) defense counsel in his argument admonished the jurors that the death had nothing whatsoever to do with appellant's guilt or innocence?

2. Was the court's instruction on reasonable doubt plain error affecting substantial rights?

3. Was the court's instruction on aiding and abetting plain error affecting substantial rights?

INDEX

TABLE OF CASES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,953

JOHN L. JACKSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Before the *voir dire* of the jury panel commenced the following occurred at a bench conference.

AT THE BENCH:

MR. LEFSTEIN: Your Honor, the defendant would request that no mention be made of the death of a priest who died after this robbery took place; and I raise the question at this time because in the event any mention is going to be permitted of the death of the priest, I believe the jury should be voir dired on that subject.

THE COURT: Well now, Government counsel had three reasons why this must inevitably come out in the trial; and you might state them for the record.

MR. MESSERMAN: My reasons are these, Your Honor:

1. It would be necessary to relate to the jury the fact that the father died immediately after this incident occurred in order to properly identify the incident to determine whether any of the prospective jurors have heard of or read about or thought about this particular case;

2. The death of the priest explains much of what occurred immediately after the robbery. It explains first of all, the conduct and actions of the remaining priest in the church rectory that was broken into and also it explains in part the vagueness of the description of the robbers which that still-living priest gave to the police immediately after the robbery. It also explains his actions during the robbery, his attempt to protect the priest whom he knew to be sick, and;

3. It explains the conduct of the defendants with regard to the recovery of certain evidence in this case. The evidence recovered was a petty cash box which was taken from the rectory of the church at the time of the robbery. The defendants allegedly threw that green petty cash box over the Key Bridge and then next day upon reading of the death of the priest became very concerned that they might become involved with this robbery or connected with this robbery as a result of the petty cash box, went back to the point where they had thrown it, recovered it and put it in a sewer off the George Washington Parkway.

Now, none of these things can be explained adequately without explaining the motivations, and the motivations are connected definitely with the death of the priest.

MR. LEFSTEIN: May I respond?

THE COURT: You may.

MR. LEFSTEIN: First of all, the defendant is quite willing to stipulate to the fact that after this robbery subsequently this priest died and this accounts for his absence.

As for the reasons mentioned by the Government, taking the first reason, I believe the case could properly be identified without referring—

THE COURT: Wait a minute. You are willing to stipulate he died but not when he died?

MR. LEFSTEIN: Yes, in the first trial the surviving priest, Your Honor, Father Cantwell, was asked about the time that he died and it got into the record the fact that he had a heart attack and died shortly after the robbery took place. It seems to me that this case could be identified for the jury without mention of the fact that the priest died.

Secondly, as far as the priest having difficulty in identifying these persons are concerned, the reason why he had difficulty is not because the priest died but because he was concerned about the health of the priest. The fact that the priest subsequently died in no way is necessary for the priest to state under oath as he did in the first trial. The reason why he did not carefully observe these men is because he was concerned about the health of Father Carney, the priest who did die. The fact that the priest later did die is irrelevant to that.

Finally, Your Honor, as far as explaining why they went back and moved a certain tin box from one sewer possibly to another place, it seems only necessary to state what in fact took place. As a matter of fact, there were two witnesses called by the Government in the first trial and only one of these witnesses said what the reason was why they went back to remove the box from one place to another and it would seem sufficient for the Government merely to bring out what in fact took place without giving the reason why they suddenly decided to make any kind of a move, Your Honor, with respect to something which had been hidden.

THE COURT: Well, you'd have to show the reason for it in order to connect them with it in some

way. Otherwise they might be casual people who just moved it. I don't see how you can possibly keep it out of the case and one thing, among others, that occurs to me is that if this is not brought out on voir dire, then inevitably sometime during the trial some juror is going to suddenly wake up to the fact that, yes, they did hear about this case, that they did know about this catholic priest and then it would be a question as not having been properly examined on the voir dire, whether the defendants got a fair trial.

So I think in all likelihood, I am not ruling at the moment without hearing the evidence whether it is going to be admissible or not but I certainly believe it will be from what Government counsel has said; and I think you better protect yourself by examining them on the voir dire; but you can use your own judgment about that.

* * * * (Tr. 4-8.)

Government counsel then identified the case to the prospective jurors without mentioning the priest's death. In response to a question whether any of them had either read about or otherwise heard of the robbery, apparently only one juror raised her hand to state that she had read about the case (Tr. 12-13).[1]

THE COURT: Wait a minute. Counsel come to the bench a minute.

AT THE BENCH:

THE COURT: I don't think the jury can intelligently answer this question unless they know all the facts.

* * * *

IN OPEN COURT:

THE COURT: Ladies and Gentlemen, in this case there is one circumstance that might perhaps re-

[1] "Tr." refers to the transcript of the instant trial held before Judge Hart.

> fresh your recollection as to whether you have ever read, heard about or discussed this case.
>
> There was living at the rectory at the time of this alleged incident, alleged robbery, a Father Carney whom I believe was in his sixties and who had had a serious heart condition and who was semi-retired but performing various tasks for the church. A few minutes after the alleged robbery, he had a heart attack and died; and that was all in the papers.
>
> Now, of course this defendant is not charged with anything in connection with that death. That was a circumstance that occurred at approximately the same time; but with that additional information—and incidentally, this did receive rather wide publicity—with that additional information, do you, any of you other ladies and gentlemen, recall having read about this case? (Tr. 13-15.)

No less than ten talesmen responded and were questioned by the court (Tr. 15-19). Thereafter, counsel for both sides completed their examinations and a jury plus four alternate jurors were selected and sworn.

Father Thomas Vincent Cantwell testified that on February 23, 1962, he was residing with Fathers Meehan and Carney in the Church of the Incarnation Rectory, 880 Eastern Avenue, Northeast, Washington, D.C. At exactly 11:00 p.m. he was awakened by the door buzzer and thought that Father Meehan would take care of the caller (Tr. 56-59). However, in approximately five minutes Father Carney called out to him, "Get up, Tom, I need some help." The witness assumed that Father Carney was suffering an attack for the latter had a very bad heart condition. A strange voice then ordered Father Cantwell to come out of his room. Upon doing so, he observed a masked man wielding a gun and a second man, also masked, holding a gun on Father Carney (Tr. 59).

While one robber remained with Father Carney the second one demanded, "I want your money." (Tr. 60.) Pursuant to that end he recovered church funds, a green

metal petty cash box and various other items of personal property, including Father Cantwell's wristwatch (Tr. 60-63, 67).

> Q How long did this entire incident take from the time they entered until the time they left?
>
> A Oh, it wouldn't be—at the most it would be 15 minutes because he apparently was trying to work fast; and, knowing Father Carney's condition, of course I was anxious to get him out before Father Carney got an attack then and there.
>
> Q Did both of these men have something covering their faces?
>
> A Both faces were covered.
>
> Q What?
>
> A Whatever it was it fitted sort of tight. I would venture to say it might have been rubber but I am more inclined to think it was a stocking, but, as I say, I wasn't too anxious—I didn't expect to ever have to describe the men. What I wanted to do was get them out and, therefore, I didn't pay too much attention to it. (Tr. 63.)

The witness identified Government Exhibit No. 1 as the stolen petty cash box and Government Exhibit No. 2 as the wristwatch taken from him by the robber (Tr. 67-68, 71-72).

On cross-examination—apparently to everyone's surprise—Father Cantwell positively identified appellant as one of the robbers (Tr. 77-78). Although he had not identified him at the prior trial, he explained that that omission was due to the form of the question asked of him, *i.e.*, at trial number one he was asked whether he could make a *facial* identification which he was unable to do, however, he could identify appellant by his general appearance, oval shaped face, and calm bodily movements (Tr. 80-82, see Tr. 86-88). (On redirect examination he indicated that appellant was the robber who had held the gun on Father Carney (Tr. 88, 95).)

With this turn in events, defense counsel suddenly became very interested himself in probing the ill health of Father Carney in an effort to discredit the unexpected courtroom identification of appellant.

BY MR. LEFSTEIN:

Q Father, I believe you testified on direct that Father Carney had been ill; is that right?
A Had been ill, that's right.
Q And what was the nature of his illness?
A He had a serious heart condition and high blood pressure, I believe, but at any rate, the main thing is he had a very serious heart condition.
Q And you were concerned about his health, were you not?
A Very much so.
Q I believe you testified on direct that because you were concerned about his health that you had not paid a great deal of attention to the two men who were in the rectory, is that right?
A That's correct. (Tr. 84.)

Kay Marie Foster testified that on the evening in question she, appellant, Harold Cross and Hazeline Price drove to the vicinity of the Church Rectory where appellant and Harold Cross left the car with pistols, returning in about ten to fifteen minutes (Tr. 100-106). "Harold thought that there was some money in the church and they would get it." (Tr. 104.) Upon their return they were carrying "miscellaneous papers and boxes and things like that." (Tr. 106.) The four of them then registered at a tourist home where the witness received about thirty dollars in silver. They subsequently drove across the Key Bridge stopping on the Virginia side, near the end, where they threw the stolen papers and boxes over the side (Tr. 109-110). The foursome then registered at a second tourist home for the night (Tr. 112). The following morning the robbers and the two girls recovered the items thrown over the Key Bridge and secreted them in a sewer.

Subsequently, Miss Foster pointed out that sewer to police officers (Tr. 111-112). On cross-examination Miss Foster was impeached with several prior convictions and she also admitted having been addicted to heroin at the time of the robbery.

Hazeltine Peyton, nee Price, corroborated Miss Foster's testimony, but was not able to recall the 1962 events with the same degree of detail as the latter witness (Tr. 159-172). Mrs. Peyton was also impeached with several prior convictions and similarly admitted having been addicted to heroin on February 23, 1962 (Tr. 182).

The following additional facts were established during the Government's case-in-chief through various witnesses and real evidence.

1. On April 9, 1962, appellant, under an assumed name, pawned the watch stolen from Father Cantwell (Tr. 154-158, 258).

2. The stolen petty cash box, Government Exhibit No. 1, was recovered by the police from a sewer on the George Washington Parkway which had been pointed out by Kay Marie Foster (Tr. 245-246).

3. Appellant, Kay Marie Foster, Harold Cross and Hazeltine Peyton registered at a tourist home in the early morning hours of February 24, 1962, and the signature on a registration card which read Mr. and Mrs. Richard Davis, was actually written by appellant (Tr. 212-232, 258-259).

Appellant relied upon an alibi defense to ward off the Government's case. See Br. 9-10.

After defense counsel, early in the trial, had Father Cantwell reiterate his testimony about Father Carney's serious heart condition in an effort to cast doubt upon his trial identification of appellant (Tr. 84), no other witness again mentioned the illness or death throughout the balance of the trial. The prosecutor never once discussed the death or illness during his summation or rebuttal argument. Indeed, the first renewed mention of Father

Carney's illness to the jury occurred in defense counsel's closing argument.

> "Now, what does Father Cantwell say? He said that the person who he now identifies as Jackson was six feet or more . . . . He indicated that the face of the man who he now identifies as Jackson was covered . . . . He indicated that his attention was riveted on Father Carney who was ill and about whom he was concerned . . . ." (Tr. 449.)

Defense counsel also admonished the jury about the relevance of the death in the following terms.

> "Now, Ladies and Gentlemen, you were asked before you were chosen as jurors whether or not the fact that there might be evidence in this case that a priest died would in any way influence your judgment. By your silence all of you indicated that it would not, and I hope it is not necessary for me to remind you that innocence or guilt of this defendant has nothing to do whatsoever with the unfortunate circumstance that a Catholic priest, in ill health at the time, died after this tragic robbery. Innocence or guilt in no way is related to that."
> (Tr. 454.)

Although this Court believed that appellant might have been confounded in his defense at trial number one because of the joinder of counts and of a co-defendant, Harold Cross, *Cross* v. *United States*, 118 U.S. App. D.C. 324, 335 F.2d 987 (1964) (2-1), this time appellant had a clear shot at the jury and that body of citizens was apparently not confounded by the evidence, for it returned a guilty verdict with dispatch (Tr. 479).

RULE INVOLVED

Rule 30, Federal Rules of Criminal Procedure, provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests.

At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

SUMMARY OF ARGUMENT

I

In exercising the broad discretion entrusted to trial judges in matters concerning the *voir dire* examinations of jurors, Judge Hart after concluding that knowledge of the facts surrounding Father Carney's death was a necessary prerequisite to any intelligent probe of the jurors quite properly informed them of that death. He was correct in revealing the facts accurately and completely in order to ascertain the correct state of the jurors' knowledge; for contemporaneous accounts of the robbery and death would have been reported as integral parts of one complete story. Nor can it be said that the prosecutor exploited the death during the trial. Consideration of the question is greatly affected by the fact that defense counsel himself explored the serious illness of Father Carney in an effort to undermine Father Cantwell's trial identification of appellant as one of the robbers. Further attenuation of any prejudice is to be found in the nature of the defense presented, *i.e.*, alibi. That theory of defense was fully developed by many witnesses which put in issue, as a practical matter, only the question of appellant's identity. The fact of the accidental death could hardly have intruded upon a fair jury consideration of that issue so well argued by defense counsel.

ARGUMENT

I. Appellant was not denied a fair trial because the jurors learned that a few minutes after the instant robbery was completed a priest, who had a serious heart condition, died of a heart attack.

(See Tr. 4-8, 12-19, 76-77, 82-88, 95, 449, 454.)

It is, of course, fundamental learning that:

> "Examination of jurors on their *voir dire* is largely a matter resting in the sound discretion of the trial court; and that discretion ought not to be revised by an appellate tribunal, unless for manifest and palpable error injurious to the appellant . . . . Much latitude should be allowed in the examination of jurors as to their opinions formed from rumor or reading . . . ." *Howgate* v. *United States*, 7 App. D.C. 217, 236 (1895). See also *Ford* v. *District of Columbia*, 102 A.2d 838 (1954), *aff'd on opinion below*, 95 U.S. App. D.C. 87, 219 F.2d 769, *cert. denied*, 349 U.S. 964 (1955).

In exercising that discretion, Judge Hart properly informed the jurors of Father Carney's death in an effort to discover which talesmen had previously heard of the case and the extent to which any prior knowledge of it might have affected their ability to sit as unbiased triers of the facts.[2] It is important to bear in mind that he only brought the death to their attention after he had determined that identification of the case by Government counsel without mention of it was inadequate to trigger the jurors' recall of the publicity surrounding the robbery. Although defense counsel agreed that the fact of Father Carney's death could be brought out, he objected to a revelation of when the death had actually occurred. Notwithstanding that objection,

---

[2] Judge Hart obviously concluded that many of the prospective jurors must have had prior contact with the facts of the case because of its extensive reporting by the news media. See Tr. 15.

once the court determined to reveal the facts, it was appropriate to have done so accurately and completely in order to ascertain the correct state of the jurors' knowledge. After all, contemporaneous accounts of the robbery and death would not have been reported as discrete events, but rather as parts of one complete story.

Nor can it be realistically urged that the prosecutor exploited the death at appellant's expense during the trial; he was quite careful not to press the point. In fact, Mr. Messerman did not even ask Father Cantwell to testify directly about the death after the latter merely alluded to it during the course of his narrative without having actually mentioned it. Nowhere in the prosecutor's closing and rebuttal arguments is there to be observed a reference to the unintended death. In analyzing this problem we also deem of significance the surprise identification of appellant as one of the robbers by Father Cantwell during cross-examination. At that juncture it was in appellant's interest for his counsel to inquire about Father Carney's serious illness and the resultant attention paid to him and not the robbers by Father Cantwell—a trial tactic that was not left unexplored in an effort to undermine the identification. See Tr. 84. Knowledge of the death directly bore on this effort, for it tended to illuminate for the jurors the true extent of the illness and the actual concern felt by Father Cantwell for his co-worker at the time of the robbery.[3]

Further attenuation of any prejudice is to be found in the nature of the defense presented, *i.e.*, alibi. Many defense witnesses were presented in support of that theory of defense and thus was put in issue, as a practical matter, only the element of identity. Was appellant one of the robbers? The fact of the accidental death for which, so far as the jury was concerned, appellant was not re-

---

[3] For support of a straight "res gestae" theory of admissibility, see *Montos* v. *State*, 212 Ga. 764, 95 S.E.2d 792, 794-795 (1956); *Louks* v. *State*, 148 Tex. Crim. 107, 185 S.W.2d 109 (1945); *State* v. *Allen*, 183 La. 1069, 165 So. 203 (1936); Tr. 76.

sponsible,[4] could hardly have intruded upon a fair jury consideration of that issue so well argued by counsel. Surely, when the death is thus viewed in the context of the entire trial proceedings one cannot say that the jury system crumbled herein, it is a far more hardy device for arriving at truth than appellant would have us believe. As aptly put by one court:

> "They [jurors] are keen analysts of evidence; they are not subsumed by the quibbles and window dressing of procedure; they are actuated rather by a sense of justice and fairness and when let alone will invariably arrive at a righteous result." *Thomas* v. *State*, 152 Fla. 756, 13 So.2d 148 (1943).

SUMMARY OF ARGUMENT AND ARGUMENT

II

(See Tr. 466-467.)

The court's instruction on reasonable doubt was not plain error affecting substantial rights. *Holland* v. *United States*, 348 U.S. 121, 140 (1954); *McGill & Hinton* v. *United States*, No. 18828-9, June 29, 1965; Fed. R. Crim. P. 30.

III

(See Tr. 469-475.)

The court's instruction on aiding and abetting was not plain error affecting substantial rights. *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949); *Barsky* v. *United States*, 83 U.S. App. D.C. 127, 138, 167 F.2d 241, 252, *cert. denied*, 334 U.S. 843 (1948); Fed. R. Crim. P. 30.[5]

---

[4] Compare *Hall* v. *United States*, 83 U.S. App. D.C. 166, 168, 168 F.2d 161, 163, *cert. denied*, 334 U.S. 853 (1948).

[5] Appellant, by the expedient of juxtaposing the aiding and abetting and recent possession of stolen property instructions, comes to the revelation that the "jury, while not convinced that appellant had participated in the robbery, could have nonetheless returned a

CONCLUSION

Wherefore, it is prayed that the judgment appealed from should be affirmed.

JOHN C. CONLIFF, JR.,
United States Attorney.

FRANK Q. NEBEKER,
ALLAN M. PALMER,
Assistant United States Attorneys.

---

verdict of guilty solely because appellant admittedly pawned a watch which turned out to be stolen . . . ." (Br. 29-30) We submit that when the entire trial record is read as one fabric, the fear expressed by appellant emerges as nothing more than a chimaera engendered by appellate advocacy and still awaiting discovery in the record.

For example, the court also instructed the jury that:

> "If after a full and fair consideration of all the facts and circumstances in evidence you find that the Government has failed to prove beyond a reasonable doubt that the defendant was present at the time and place of the commission of the offense charged in the indictment, then one of the essential elements of the offense is lacking and it would be your duty to find the defendant not guilty." (Tr. 473.)
>
> * * * *
>
> "Of course, in determining whether or not the defendant was present at the scene of the crime, you will consider all of the evidence adduced including that of possession of recently stolen property, if you find he had possession of recently stolen property." (Tr. 475.)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 708051 239